

**COMING OF AGE:
21 YEARS OF THE CHILDREN'S HEARINGS SYSTEM**

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In April 1992, the Scottish Children's Hearings System will have been in operation for 21 years. Since its introduction the general acceptance of the Hearings as an appropriate forum for the making of decisions about children has been reflected in the absence of any vigorous or concerted arguments either in favour of its abolition or in rejection of the philosophy on which it is based. Nor have the events of 1991, including what has become enshrined in public consciousness as the Orkney Affair, provoked any fundamental threat to the philosophy on which the unique system of justice for children in Scotland is based.

There have of course been changes introduced and questions asked about both the practice and the philosophy underpinning the Hearings System during the past 21 years, and that is only to be expected. By and large, however, any alterations to the system have been mainly incremental, either by way of extension to its remit, or in the form of practical attempts to provide solutions to the tensions and conflicts experienced by most systems of juvenile justice. But it can no longer continue to claim to be a 'new system', having come of age with all the responsibilities this brings. The main purpose of this paper is to examine critically the development of the Children's Hearings System over the past 21 years, and to anticipate some of the issues it will surely have to address as we head for 2000 AD.

The benchmark against which evaluation of the Hearings system is often undertaken is the court-based system of justice for children as it is realised in England and Wales. However, there are particular dangers associated with the continual need to compare our major social institutions with their counterparts south of the border, and I will return to this later. My argument will be that the current operation of the Children's Hearings System and its future developments can be better appreciated by being located in the context of a broader, particularly European, context. The whole question of children's rights, a key element throughout this paper, and the extent to which the rights of children are protected within the Children's Hearings System, can only benefit from a consideration of how such issues are seen in the rest of Europe.

The Kilbrandon Report

In 1964, the report of the Kilbrandon Committee⁽¹⁾ was published, and

although the recommendations contained therein were seen to be radical and controversial at the time (particularly by the Law Society of Scotland), they provided, with some modifications, the philosophical basis of the 1968 Social Work (Scotland) Act. It took only four years from the publication of the Kilbrandon Report to legislative provision for the introduction of a revolutionary form of justice for children, rejecting traditional notions of how to conceive of and deal with children, particularly children who commit offences.

The Kilbrandon Committee had been appointed in 1961:

To consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care and protection or beyond parental control and, in particular, the constitution, process and procedures of the courts dealing with such juveniles, and to report.

What had made the recommendations of the report so controversial was the rejection of a court-based system of justice as inappropriate for children. Two main assumptions underpinned the main recommendations of the report – that there was no essential difference between children who commit offences and children in need of care and protection; and that a court-based system of justice is inappropriate for children. The basic conflict for any system of juvenile justice is how best to reconcile the competing claims of the law, judicial process and punishment with the need to take into consideration the welfare of children. The Kilbrandon Committee had argued that delinquency or offence behaviour should be seen as symptomatic of need, and that such children should be dealt with in the same way and in the same forum as other children in need of care and protection. The committee had also recognised that any court system which has to take into consideration the responsibility of offenders and can punish is inhibited when it comes to making decisions about the most appropriate welfare measures for children. A court-based system was rejected then because of the impossibility of reconciling the determination of guilt with welfare dispositions, because of the inappropriateness of punishment for the majority of children who offend, and because of the inappropriateness of having welfare decisions made by those who have the expertise and training to decide on questions of guilt or innocence but who lack the necessary expertise when it comes to the needs of children. Court proceedings themselves were also seen to prevent open discussion and the opportunity for full exploration of the needs of children. The formality and ritualistic nature of court proceedings was seen to militate against the best interests of the child in so far as they prevented open and informal discussion, and had the potential to stigmatise.

As a unique solution to the basic conflict of the juvenile court, the Kilbrandon Committee had recommended the complete separation of responsibility for deciding on guilt or innocence from the responsibility of

deciding upon appropriate welfare measures. It is this principle which is the foundation stone on which rests the Children's Hearings System as introduced through the 1968 Act and implemented in April 1971. In all cases, the key factor is the welfare of the child, and decisions about children's welfare, whether of children who offend or children in need of care and protection, are ultimately the responsibility of three members of the community, the panel members, whose only remit is to make decisions about the need for compulsory measures of care. The Children's Hearings are **not** courts of law, and where parents or children dispute the grounds of referral, the case cannot proceed but must be passed to the Sheriff for determination of the facts. As a form of protection for children in a system in which there is neither legal representation nor judicial scrutiny of welfare decisions made, children and their parents have a right to appeal to the Sheriff.

The 1968 Act had also created the post of Reporter. It is to the Reporter that all initial referrals are to be made, and he or she has the discretion to decide whether or not a case should proceed to a hearing. Although most children were to be dealt with by the Hearings, some – as Kilbrandon had argued – were still to be referred to court for particular offences, including serious and more technical offences. It is often forgotten that children can still be, and indeed are, prosecuted in Scottish Courts and, as the Orkney Affair has revealed only too well, that there is an intricate network of relationships between the Hearings and the Scottish Courts.

The development of justice for children in Scotland since the Kilbrandon Report has to be seen in conjunction with the development of social work. The two are historically and inextricably linked and the 1968 Social Work Scotland Act also provided legislative statement for the reorganisation of the various social services into a unified social work department. The significance of this is that not only did the **single** 1968 Act introduce a new system of justice for children but it also introduced a new organisational structure for social work built on generic principles and which included both probation and after care for offenders generally.

Now it is impossible in a short paper to do service to the Kilbrandon Report and to identify in detail the nature of the changes introduced by the 1968 Act. More detailed histories and commentaries are readily available elsewhere.⁽²⁾⁽³⁾ Nevertheless, a number of issues can be identified which have continued to be the focus of comment since the very earliest days of the system and which we will refer to later. These include:

- the absence of legal safeguards for children;
- the rights of children;
- the wide discretion available to key personnel such as the Reporter;
- the relationship between the criminal courts and the hearings;
- the erosion of the distinction between offenders and non-offenders;
- the informality of the system;

the justice of the system.

Such concerns have been around since the introduction of the system and have been the subject of continuing comment. Nor are they of purely conceptual interest, for they have significant implications for the actual functioning of the system in practice, as events over the past 21 years or so have shown. They all relate to the key question that has to be asked of any system of juvenile justice. That is, the extent to which a system based on welfare principles and concerned ultimately with the best interests of the child can at the same time offer children and their families protection from unwarranted interference, abuse and intervention in their lives from the very system designed to help them. This has been never more so than in the context of the Orkney Affair, or Cleveland and Rochdale in England. What these have all identified clearly is the thin line that exists between intervention in children's lives in their best interests and unwarranted interference and waiving of the rights of children and their families.

But any system of justice for children has also to be seen in the context of the social, political and economic climate in which it is located. Over the past two decades there have been important shifts in political ideology (some of which do not fit easily with a system based on welfare principles); there have been significant changes in social work thinking about how to deal with children; the economic situation has changed considerably; there has been a number of dramatic occurrences involving the deaths of children, some of whom have actually been in care; child and sexual abuse have been "discovered"; membership of the panels has also changed⁽⁴⁾, and the very citizenship status of children and their rights have become common currencies in the political agenda. There are also some important changes in terms of the profile of children referred to the Reporter and to the Hearings and these should be considered first before looking at the implications of some of the wider issues.

21 Years of the Hearings – a statistical commentary

As in most European countries the numbers of those caught up in formal systems of social control have increased steadily over the past twenty years.

In 1989, the total number of referrals was 37,352, the second highest since the hearings were introduced, and 24,210 of these referrals were for offences committed. For that reason, and in keeping with most systems of justice for children, by far the greater proportion of those involved were boys. 15,787 boys and 6,673 girls were referred to the Reporter. However, and there is surely a need for empirical work to explore what underlies these and other statistics, only 36% of these children went to a hearing, and in contrast to the proportionately higher number of boys referred to the Reporter 39% of girls referred went to a hearing compared with 35% of boys. What may account for this is that half of those referred on non-offence grounds go to a hearing

whereas only 28% of those referred on offence grounds actually go to a hearing. The greater involvement of girls in a system of justice and for what we might term broadly care and protection reasons, has been well documented throughout Europe in the last decade.⁽⁵⁾⁽⁶⁾

Peak referral age on offence grounds was 15 and on non-offence grounds, 14. The significance of the peak referral age rests in the fact that the hearing system can retain jurisdiction over children up to 18 under existing legislation but rarely does. Recent discussions about the possible direction that could be taken by the hearings system include consideration of the possibility of extending the age at which children can be brought before a hearing to 18 for all children.⁽⁷⁾ It also points to the problems faced by all criminal justice systems about how to handle the issues posed at the interface between juvenile justice systems and criminal justice systems. In Scotland, though we have a system based on welfare principles for the majority of children up to 16, we also have a criminal justice system which commits a higher proportion of young adult offenders to custodial institutions than almost every other European country.⁽⁸⁾

It is when comparisons are made over time however that the most dramatic shifts in the statistics can best be appreciated.

Between 1980 and 1989, there was a 29% increase in the total number of referrals and the rate of referral (per 1,000 in the 8-15 year old age group) rose from 15.4 to 21.8. The rate of referral for boys rose from 20 to 29.8 and for girls from 4 to 13.3.

The number of referrals on offence grounds increased over the same period by 9% but they fell as a proportion of all grounds from 77% to 63%. That is, by far a greater proportion than before of all referrals to the Reporter are for non-offence grounds. The number of non-offence grounds of referral increased in this period by a massive 113% and in most cases this was because it was alleged that the child had been the victim of an offence or was lacking parental care. The profile of cases and the workload of panel members has shifted considerably since the beginning of the system. In relation to residential care, the proportion of children subject to some form of residential requirement fell from 30% to 16%.

The general picture that can be drawn from all of this then is that more referrals are being made to the hearings system, more boys are referred than girls, residential care is being used less as an option and there has been a dramatic increase in the number of care and protection cases.

What also has to be borne in mind is that what the national figures conceal is wide variation in regional practices. In fact, because of the differing regional practices, because of the differential availability of resources in local communities and because of different social work practices, it could be said

that Scotland does not have one system of justice for children but rather has a number of different systems operating on a regional basis. For example in 1989, the overall referral rate per 1,000 children (8-15 age group) was 21.8. In Central Region, the figure was 30.4, Tayside 17.4, Lothian 20.7, Grampian 14.0 and Strathclyde 25.1.

Referral rates have also changed differentially over time with, for example, Central having rates of 4.9 and 12.0 for non-offence and offence grounds respectively in 1982 compared with 15.1 and 17.1 for 1989. In the same period, Tayside started with a rate of 4.1 for non-offence grounds rising to 9.0 in 1989, and 11.8 dropping to 9.4 on offence grounds.

Comment has already been made on the wide discretion available to Reporters and this is certainly reflected in the practices as recorded through statistical returns. Of all referrals to Reporters in 1989, 38% proceeded to a hearing. Of the other referrals, in respect of half of these no formal action was taken. Since 1980 in fact the proportion of all cases coming to the notice of the Reporter and in which he has decided to take no formal action has increased from 35% to 50% and the proportion of those referred on to a hearing has dropped from 53% in 1978 to the 38% for 1989. Now the intriguing question relating to these statistics is not what they tell us about the rates of referral as such but what social, personal and organisational practices underlie their production. The rise in no-formal-action-taken decisions by Reporters, coupled with a decrease in the use of residential care, is taken by some⁽⁹⁾ to indicate an increasing commitment to less rather than more state intervention in children's lives. That is, a philosophy of minimalist intervention is being acted upon by key individuals in the system, and social work departments are less interventionist-inclined than the public decision-makers.⁽¹⁰⁾

But the main point to make here is that as well as the changing profile of cases coming to Reporters and before the Hearings, there does seem to be some evidence of widespread variation in practice throughout Scotland. What this may point to is that the question of resources and their availability may well be a determining factor in the way in which decisions are made.

Lockyer has identified the way in which resource distribution and allocation has influenced decisions made by panel members⁽¹¹⁾. Although there appears to panel members to be no national shortage of resources overall, there is certainly a problem of the geographical distribution of resources and an imbalance in favour of the younger child. On the basis of his study he concluded that decisions by panel members had been influenced by resource issues in 20% of all cases, projecting this to involve over 4,000 hearings a year and affecting 3,000 children. Of these cases, it is those involving offence grounds, and by implication older children, in which the effect of resource shortage is most acutely felt.

The Kilbrandon Committee had envisaged a wide range of services

available to meet the very different problems faced and posed by children, and had argued for a preventive approach involving the different agencies concerned with children. The indications are however that the future of a system of justice for children will be uncertain and inhibited if there is an absence of a diversity of resources available which reflects the diversity of needs expressed and experienced by children.⁽¹²⁾ The changing population of children now going through the hearing system and the problems posed by them, have to be seen in light of continued financial constraint on local authority budgets, and particularly on social work departments. Early optimism amongst panel members that resources would be made available to carry out the spirit of Kilbrandon was seen to be a misjudgment.

It is plain now that this optimism was misplaced. Resources are still frustratingly scarce in all fields.⁽¹³⁾

When the Orkney child abuse case hit the headlines there was genuine surprise that it had happened and that it **could** happen in Scotland. The close and positive working relationship that had existed in the early days of the system was seen to provide child care in Scotland with a procedural framework which would prevent such a possibility.

In relation to child abuse cases Black⁽¹⁴⁾ argued:

It is helpful to know that in Scotland we share the responsibilities in a very public way with the children's hearing and that much of the social work decision-making is subject to the scrutiny of children's panel members.

However as Black also appreciates⁽¹⁵⁾ the scarcity of resources coupled with changing images of social work, largely due to tragic events in England and Wales, has introduced an element of distrust and animosity towards the social work profession. What the Orkney case has also done has been to highlight the difficulty of identifying just who has ultimate responsibility for making decisions about children's best interests, professionals or the lay panel members.

Again, and this is not new, the issue of boundaries between and responsibilities of the different constituencies within the hearing system has been the subject of continued debate since the introduction of the hearings system. The questions raised by Orkney illustrate graphically issues to do with the proper professional treatment of children and not just those the subject of abuse; with the role of social work and the location of ultimate responsibility for decision-making, with the wide discretion available to the reporter and with the possibility of failing to follow procedural guidelines because it is in the best interest of the child. Now I want to be clear here that this does not constitute an attack on the Scottish system of justice for children. Rather, it is a recognition that no system of justice for children can be exempt from criticism

and that complacency cannot be allowed to take the place of continued examination of both principles and practices.

The changing nature of the population of children going through the hearing system also has to be seen in the context of changing conceptions of the rights of all children generally and not just those who are caught up in the formal processes of social control. Judgments about any system of justice, whether it be for children or adults, have to be based on an analysis not only of how the rights of individuals are treated within the system but also the way in which their rights are respected outwith that system in the social, economic and political climate in which they live.

Protecting the rights of children

What actually happened in the Orkney child abuse case may never be known, but the case served to illustrate the complexity of seeking to protect the rights of children in a system ultimately concerned with their best interests. Browne asserts⁽¹⁶⁾

Where are we now in relation to the protection of children in general and these children in particular. I would argue we are in the worst possible situation.

But the lack of clarity as to just where children can be expected to be protected within the hearings system is not new, and the Orkney Affair, we can say without in any way wishing to detract from the seriousness of the whole affair for all those concerned, has merely provided a graphic example of tensions and conflicts that have been around since the system was introduced 21 years ago.

Criticisms of the lack of sufficient protection of children from unwarranted intervention have been made by a number of commentators.⁽¹⁷⁾ Nor have such concerns been ignored, for there have been suggestions that children's rights could be protected in the hearings by some kind of "child advocate"⁽¹⁸⁾ and even that lawyers could be introduced to the hearings system to act on behalf of children. Concern about the lack of legal scrutiny of decision-making has also been voiced because of the low number of appeals that were made in the early days of the hearings, with in 1974 only 28 appeals being made in relation to almost 16,000 hearings decisions. Kilbrandon had expected the appeals system to provide a powerful means of protection for children, though the low number actually made soon cast doubt on their efficacy.

Concern had also been expressed about the lack of certainty as to the grounds an appeal could be heard by the Sheriff. That is, whether the Sheriff could hear the appeal on questions of competence (about the following of a proper procedure) or on material questions about the nature of the decision

made itself. And again, the decision by Sheriff Kelbie in the Orkney case to dismiss the allegations without going to proof is reminiscent of debates held almost twenty years ago, the main difference being though that in the case of Orkney the Sheriff himself was seen to ignore the basic principles of natural justice and procedural guidelines.⁽¹⁹⁾

Research has also pointed to the ways in which the rights of children can be denied in the hearings.⁽²⁰⁾ Identifying the ways in which basic rules of procedure were being ignored. Again, the Orkney Affair illustrates that procedural irregularities do still operate within the hearing system, perhaps more often than is thought – the non-attendance of children at hearings being a crucial example.⁽²¹⁾

In recognition of some of the concerns discussed, safeguarders were appointed in 1985 in Scotland under S34a of the 1968 Act. The main function of the safeguarder is to express the interest of the child particularly where there is a conflict of interest between the child and his or her parents. But again the number of safeguarders appointed has been very low, with less than 2% in court proceedings and less than 1% in hearings.⁽²²⁾

More recently, the Child Care Law Review Group has recommended that a "separate examination should be commissioned by the Secretary of State of the case for and the feasibility of a Child Welfare Commission in Scotland".⁽²³⁾ One of the functions of such a commission, perhaps through the auspices of a child's ombudsman, would be to advise children on their rights as well as to promote change in all aspects of policies governing children's welfare and interests. It is this potential widening of interest in children's rights that associates the Children's Hearings with broader international developments. In particular, the rejection of the notion of children as merely the **objects** of care and protection or the **objects** of state intervention is gradually being replaced in practice by a new conception of children as **subjects** with rights very similar to those available to adults. The Report of the Child Care Law Review Group⁽²⁴⁾ recognised the potential of the hearings system to develop strategies and structures for children which grants them a political and social voice. It also recognised that in the 1990s it is not just the practices adopted towards children that will be challenged but the very notion of childhood itself and its relationship to adulthood. The pursuit of legal actions by children, the availability of legal centres or "law shops" as they are known in Holland⁽²⁵⁾ are all premised on principles promoted by the Child Care Law Review Group.

Most of the arguments about children's rights in the 1970s, and certainly those which were used to criticise the operation of the Children's Hearings in the 1970s and early 1980s, derived largely from the works of the Return to Justice Movement. The Return to Justice Movement argued that any system which deals with children, particularly children who commit offences, in terms of welfare philosophies and measures will inevitably be unjust. Further they argued that children who commit offences should be punished on retributive

grounds and should be dealt with by different courts from children who are in need of care or protection. This is of course anathema to the principles espoused by the Kilbrandon Committee, but there are a number of reasons for bringing this in.

Firstly, the Return to Justice arguments fitted in very neatly in the beginning of the 1980s with a political ideology which was based on the primacy of personal responsibility. At the time, critics of the Return to Justice principles couldn't in fact see how any distinction could be made between punishing children and punishing adults.⁽²⁶⁾ The Hearings system in contrast has had to survive the threats to the very philosophy on which it is based which emanate from a social, economic and political ideology which attributes weakness and failing to those dependent on welfare provision.

Secondly, the conception of children's rights adopted by the Return to Justice Movement was a very narrow concern with the procedural injustices of systems of welfare. It also adopted a very narrow conception of justice, relating it largely to the treatment of criminal cases and ignored the social and economic circumstances in which children found themselves.

Thirdly, the 1989 Children Act in England and Wales has introduced not just separate proceedings but separate courts for children, with juvenile courts dealing with offenders and the new family proceedings courts handling all care and protection cases. All this is much along the lines of the arguments made by the Return to Justice Movement and also reflects what has been referred to the dangers of the "twin track" approach⁽²⁷⁾ in which social policy for young offenders is characterised by an increasing commitment to harsher forms of punishment as well as welfare options.

Lastly, but closely related, not only are children south of the border to continue to be punished for offence behaviour, but parents are to be held more responsible for the behaviour of their children. In some cases this will mean that parents themselves will be the subject of sanctions, as David Waddington the then Home Secretary asserted, "to bring home to them the true nature of their responsibilities".

The relevance of all this for the Children's Hearings system is that in evaluating the unique Scottish system of justice for children, comparisons with juvenile justice in England and Wales will continue to give a distorted picture of its achievements and merits. The Kilbrandon Committee not only rejected the structure of the juvenile court but also the philosophy and principles on which it is based, and it is inappropriate to continue to use it as the benchmark for a system which operates on very different principles. The Kilbrandon philosophy is one in which justice for children means providing appropriate measures to help children and their families, and the very operation of the system has to be judged by different criteria. There are obviously issues that have to be fully resolved in terms of procedural guidelines, and it is to be hoped

that the recent inquiry set up to examine the Orkney child abuse case will result in improved practice. Nevertheless, the Children's Hearings system has been in the forefront of juvenile justice systems in promoting a conception of children's rights which include giving children the right to be heard, to be involved in decision making about, and to be treated with decency and respect in, a system that is ultimately concerned with their well being.⁽²⁸⁾ In that respect, the Children's Hearings anticipated many of the conditions laid out in the Convention on the Rights of the Child and adopted by the United Nations in 1989. Despite the commitment south of the border to the juvenile court structure, the Children's Hearings continue to attract international interest as a possible model for future reform⁽²⁹⁾, and also share principles with other European systems. For the French, for example, the separation of criminal and civil jurisdictions – the separate treatment of those children who commit offences from other children in need of care and protection – is unthinkable:

For us, separating out juvenile delinquents from welfare cases just does not make sense.⁽³⁰⁾

Moreover, the formality of the English juvenile court is alien to the French magistrate who will hear by far the majority of cases in the informal setting of his office, involving parents and child in negotiations about the appropriate measures. There is sufficient evidence from the earliest days of the Hearings System⁽³¹⁾ that panel members likewise, in the context of the hearing, are involved in a process where children and parents can and do speak, and where time is available for a fuller exploration of issues than is available in an English style juvenile court.

And the conception of rights from the perspective of most European countries is much less concerned with the formal justice of court proceedings than with the social rights of children in the community. The French judge is nicely described as being "le garant de son droit à l'éducation", roughly translated as the guarantee of the child's right to his/her upbringing and involving the judge in all matters affecting the welfare of the child and his or her family. It is the commitment to a broader conception of justice for children which the Scottish system shares with a number of its European counterparts and which provide a more accurate baseline from which to evaluate the merits of the Hearings System.

Children, Prevention and the Politics of Inclusion

But all of this is not to argue that there is no room for further growth in the Hearings System – 21st birthdays also perform the functions of rites of passage. One of the key principles in the Kilbrandon philosophy was that of prevention. But, and this is perhaps not unexpected for it has been a recurrent feature of other areas of social policy, there has been little development of preventive strategies. The failure to develop strategies designed to prevent children coming into contact with formal processes of control is seen even by those with

close involvement in the Hearings System to threaten the proper functioning of the system.⁽³²⁾

There is a number of reasons as to why this might be so. First, the Children's Hearings System deals only, by definition, with those children who come into contact with it. Secondly, the development of services for children and their families has been needs driven – that is, they have been designed largely to meet the needs of a specific section of the community. Thirdly, children who do come into the Hearings System are dealt with largely in isolation from the very social and economic circumstances which may have prompted their referral in the first place. Panel members themselves have become more politically vocal over the past twenty one years, and many will accept the view that something has to be done about the

..Deteriorating conditions of life for many children, especially for children of poor families (by far the largest group referred to Reporters and appearing at hearings)⁽³³⁾

Lastly, a system which claims to treat children in terms of a conception of justice which attributes to them wider social rights as members of the community cannot afford to ignore the implications of a political and ideological climate which has seen a widening of the gap between the rich and the poor and in which welfare resources generally are severely constrained. Moreover the gap is not just a financial one but also a social one, with many members of the community, particularly the young, experiencing marginalisation.

Again, comparisons can't be easily made between the Scottish system of justice for children and what happens in England and Wales. Over the past 21 years, the Hearings System has continued to grow in the face of the cold wind of Thatcherism and a conservative ideology which does not favour welfare philosophies and collective provision. The Children's Hearings have to be judged not simply in terms of how the rights of children are met within the system, though that is obviously important. The system also has to be judged on wider criteria relating to how it views the position of children and their families in society generally. In that respect the Hearings System is much closer ideologically to developments in the rest of Europe where the rejection of individualistic explanations of social problems and concern at the exclusion of sections of the community from society, are also accompanied by a trend back to seeing collective welfare provision as being both practically and ideologically acceptable.⁽³⁴⁾

Several European countries⁽³⁵⁾, particularly France, have recently adopted a programme of social crime prevention. Social crime prevention is premised on a number of assumptions, some of which are very close to those of the Kilbrandon Committee, and includes the recognition that repressive strategies for dealing with crime and piecemeal attempts at solving social

problems are a waste of both time and money. This is because punitive approaches to dealing with offenders, particularly the young, are seen to be ineffective and do not tackle the real problem. Instead of punishment, a more appropriate response is to tackle the fundamental problems of marginalisation of the young caused largely by negative life experiences.⁽³⁶⁾ The "twin track" policies of welfarism and harsh punishment had failed to reduce the escalating crime rates and had in part served to further marginalise young offenders. In addition social crime prevention is not simply about the prevention of crime, but is about tackling the social and political problems experienced by the less well off in society generally. The criticism that could and has been made of the Kilbrandon philosophy itself is that it is highly individualistic in its explanation of the aetiology of delinquency and the difficulties encountered by children generally.

Now there is no argument being made here that social crime prevention as envisaged in Europe could be incorporated wholesale into the Scottish cultural context. But there is a number of elements to it which offer possible pointers for the development of the Hearings System in the future and which could allow the hearings to "return to Kilbrandon". Nor is this just for those who commit offences, but also for those children who are in need of care and protection. One of the key principles on which social crime prevention is based is the commitment to **including** those who are in need of help rather than excluding them from society. Again, the notion of rights deployed emphasises the notion of social and citizenship rights rather than fixating on the rights of children within systems of justice. And where the young are in need of help or care, the task of the welfare and other services is to as far as possible see to the insertion of the individual into the community. A holistic view of the child or young person is taken and all aspects of his or her life are taken into consideration – housing, education, employment, income and so on. Kilbrandon had himself identified the need to provide a wide range of agency provision to allow the potential of the Hearings System to be realised in improving the life chances of children. Without the support of adequately resourced welfare services those most in need of help will continue to be excluded from society, and to be marked out as deviant and somehow as different from the rest of us. Barty⁽³⁷⁾ puts it well in asserting:

When people are perceived as deviants they experience social welfare as a threat rather than a resource for solving problems... A different approach urges social welfare to develop a supportive orientation in the services. The point of departure is to give positive support to the development potential of individual/families/communities rather than preventing behaviour which is termed deficient.

In that respect, the most revolutionary element of a social crime prevention strategy is the commitment to the integration of the different social and allied services, and the production of a fully integrated package of policies aimed at

improving the social and economic profile of an area. Housing policies, employment policies, educational policies, police policy, social work policies and health policies are all to be coordinated at a local level in order to improve the social and material conditions in which sections of society have to live. And just as importantly, resources are to be made available at the local level so that the strategies devised can be designed to meet the particular needs of different communities. Nor is the attraction of such a policy purely theoretical, for social crime prevention strategies have been identified by the Council of Europe as having the potential to improve the conditions and circumstances in which people live;⁽³⁸⁾ the French have established a "Ministere de la ville" to coordinate preventive policies throughout France⁽³⁹⁾ and arguments have been made in Eastern European countries for such an approach as a contribution to social development in general.⁽⁴⁰⁾ In the Scottish context, preventive policies based on the European model would rest easily in a country with a welfare approach to dealing with children.

What some European commentators⁽⁴¹⁾ have noticed in recent years is that there is in Europe an increasing shift away from explanations of social problems in individualistic terms to more societal explanations, an increasing acceptance of collective solutions and an increasing commitment to a politics of inclusion – tackling issues of marginalisation and social polarisation – particularly for the young. If the Hearing System is to develop, a decision will have to be made about whether judgements will continue to be made of its value against the juvenile court structure and associated philosophy in operation in England and Wales or whether it will return to its European roots and build on the conceptions of justice and the rights of children formulated in the Kilbrandon Report. If the latter, the future development of the hearings system will have to be seen in relation to an overall appraisal of the contribution of health, educational and welfare policies generally in substantially affecting the lives of many individuals and communities. More critical research is also needed to provide an accurate picture of just how the Hearings System operates. There has been very little systematic research conducted into the workings of the hearings in recent years.

This paper has been deliberately broad in its examination of the Scottish Children's Hearings System, largely because by doing so the general principles on which the system are premised can best be articulated and reviewed. The Orkney child abuse case and other such problematic occurrences will of course in the long run hopefully contribute to improved practices and procedures which will benefit children and their families. Questions about legal protection and children's rights within the system are of course important, but they have to have to be articulated in relation to the ideals and philosophy on which the system rests and to the adequacy of the resources for carrying out that philosophy. For that reason, comparisons made with the system of juvenile justice in England and Wales can't be the only criteria on which evaluations of the Hearings System are based. The conception of justice for children, the notion of children's rights and the relationship of the Hearing System to, and

the place of the child in, society are too different from the English system for that.

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